

**EXHIBIT A**

**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**TODD and BONNIE OVERTURF and  
THE OVERTURF COMPANY,**

**Plaintiffs,**

**v.**

**ROCKY MOUNTAIN CHOCOLATE  
FACTORY, INC., BRYAN J.  
MERRYMAN, et al.,**

**Defendants.**

**CASE NO. SACV 08-0365 AG (RNBx)**

**ORDER GRANTING IN PART AND  
DENYING PART DEFENDANT'S  
MOTION TO DISMISS**

Before the Court is the Motion of Defendants Rocky Mountain Chocolate Factory, Inc. ("Defendant RMCF") and Bryan Merryman ("Defendant Merryman"), to Dismiss for Failure to Sufficiently Plead a Claim, for Failure to State a Claim, for Failure to Allege that Consideration Failed in a Material Respect, for Lack of Standing, and Failure to State a Claim for Fraud. ("Motion"). After reviewing the moving, opposition, reply papers, and oral argument by the parties, the Court GRANTS in part and DENIES in part the Motion.

**BACKGROUND**

Defendant RMCF is a franchisor of retail stores that sell gourmet chocolates and other premium confectionary products. In 2005, Plaintiffs Todd and Bonnie Overturf, and The

Overturf Company, (“Plaintiffs”) entered into two franchise agreements with Defendant RMCF. One franchise agreement was for a retail store in Westminster, while the other was for a retail store in Huntington Beach. When negotiating the Franchise agreement, Plaintiffs were supplied with a Uniform Franchise Offering Circular (“UFOC”). Plaintiffs signed the UFOC acknowledging that they had received the UFOC in adequate time to review it. Plaintiffs also signed the franchise agreement agreeing to the terms. (Franchise Agreement § 22.15.)

In 2008, Plaintiffs closed their Westminster store because it was not financially successful. (First Amended Complaint (“FAC”) ¶¶ 53-59.) They now bring claims against Defendant RMCF, alleging: (1) breach of contract and covenant of good faith and fair dealing; (2) fraud; (3) failure of consideration; (4) violation of the California Franchise Investment Law; (5) violation of Cal. Bus. & Prof. Code § 17000 *et seq.*; (6) violation of Cal. Bus. & Prof. Code § 17200 *et seq.*; (7) fraud under Cal. Civil Code § 1571; and (8) conspiracy to commit fraud. Plaintiffs also allege that Defendant RMCF’s Chief Operating Officer Defendant Merryman violated Cal. Bus. & Prof. Code § 17200.

Plaintiffs’ FAC seeks: (1) general and special damages; (2) punitive or exemplary damages; (3) award of pre-judgment interest; (4) cost of suit; (5) preliminary and permanent injunction from Defendant RMCF conducting illegal, fraudulent, and unfair trade practices; (6) restitution of all royalties, marketing fees, and its profit on the shipment and sale of product; (7) disgorgement of revenues obtained by violating Cal. Bus. & Prof. Code § 17200; (8) penalties for violating Cal. Bus. & Prof. Code §§ 17200 and 17500; (9) attorneys’ fees; and (10) any other relief.

## **LEGAL STANDARD**

A complaint must be dismissed when a plaintiff’s allegations fail to state a claim upon which relief can be granted. Fed R. Civ. P. 12(b)(6). Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to

1 relief.” Fed R. Civ. P. 8(a)(2). “Ordinary pleading rules are not meant to impose a great burden  
 2 upon a plaintiff.” *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). “Specific facts are  
 3 not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is  
 4 and the grounds upon which it rests.’” *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per  
 5 curiam) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007)). Thus, a  
 6 complaint may not be dismissed for failure to state a claim where the allegations plausibly show  
 7 “that the pleader is entitled to relief.” *Bell Atlantic*, 127 S.Ct. at 1965. Conversely, a complaint  
 8 should be dismissed for failure to state a claim where the factual allegations do not raise the  
 9 “right of relief above the speculative level.” *Id.*

10 The Court must accept as true all factual allegations in the complaint and must draw all  
 11 reasonable inferences from those allegations, construing the complaint in the light most  
 12 favorable to the plaintiff. *Westland Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir.  
 13 1993); *see also Enesco Corp v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1988). “The  
 14 court need not, however, accept as true allegations that contradict matters properly subject to  
 15 judicial notice or by exhibit.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.  
 16 2001) (citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)). “Nor is  
 17 the court required to accept as true allegations that are merely conclusory, unwarranted  
 18 deductions of fact, or unreasonable inferences.” *Id.*

19 Dismissal without leave to amend is appropriate only when the Court is satisfied that the  
 20 deficiencies of the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353  
 21 F.3d 750, 758 (9th Cir. 2003) (citing *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996)); *Lopez*  
 22 *v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000); *Polich v. Burlington N., Inc.*, 942 F.2d 1467,  
 23 1472 (9th Cir. 1991).

## 24 ANALYSIS

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 26  
 27 Defendant RMCF moves to dismiss Plaintiffs’ first through eighth, eleventh, and twelfth  
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claims against it, as well as Plaintiffs' sixth, eleventh, and twelfth claims against Defendant Merryman. Defendant RMCF argues that: (1) Plaintiffs have not stated a claim; (2) Plaintiffs have not alleged that consideration failed in a material respect; (3) Plaintiffs lack standing to bring claims under the Cal. Bus. & Prof. Code § 17200; and (4) Plaintiffs have insufficiently pled some claims. Because Plaintiffs have withdrawn their fourth and fifth claims of action against Defendant RMCF and their eleventh and twelfth claims of action against Defendant Merryman, the Court discusses only the other claims for relief.

**1. PLAINTIFFS' FIRST CLAIM FOR RELIEF FOR A BREACH OF CONTRACT AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

Defendant RMCF argues that Plaintiff has not stated a claim for breach of the contract or the implied covenant of good faith and fair dealing. The Court agrees.

The Court applies Colorado law under the parties' Franchise Agreement. (Plaintiffs' Franchise Agreement § 22.1.) Under Colorado law, a breach of contract requires: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992).

Under Colorado law, every contract contains an implied covenant of good faith and fair dealing. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Col. 1995). An implied covenant of good faith and fair dealing requires "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Occusafe, Inc. v. EG&G Rocky Flats, Inc.*, 54 F.3d 618, 624 (10th Cir. 1995) (citation omitted); see also *Restatement (Second) of Contracts* § 205 cmt. a (1981). However, "it will not contradict terms or conditions for which a party has bargained." *Id.*; *Grossman v. Columbine Medical Center*, 12 P.3d 269, 271 (Col. 2000).

Plaintiffs allege that Defendant RMCF breached the contract and covenant of good faith

1 and fair dealing by: (1) advising Plaintiffs that the Westminster location had a “reasonable  
2 occupancy cost”; (2) offering products to discount retailers at lower prices than those offered to  
3 franchisees and failure to disclose such actions; (3) offering products to discount retailers not  
4 available to franchisees and failure to disclose such actions; (4) failing to use marketing fees to  
5 promote the franchisees; and (5) advising franchisees that the change in royalty structure  
6 benefitted the franchisees.

7  
8 **1.1 Statement that the Westminster Location had a “Reasonable**  
9 **Occupancy Cost”**  
10

11 Plaintiffs allege Defendant RMCF told them that the Westminster location had a  
12 reasonable occupancy cost. (FAC ¶ 33.) The Court is unaware of any provision of the contract  
13 that is breached by such a statement. Further, the Franchise Agreement and UFOC both state  
14 that Defendant RMCF would not be liable for any oral representations made, that Plaintiffs  
15 acknowledged and agreed that no representation had been made regarding the potential success  
16 of the business, and that Plaintiffs were responsible for selecting their location. (*See* Franchise  
17 Agreement §§ 22.4, 22.15, UFOC § 19, and Closing Acknowledgement § 8.) Thus, this  
18 representation did not breach the contract. Nor did it breach the implied covenant of good faith  
19 and fair dealing.  
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21 **1.2 Offers of Products to Discount Retailers at Lower Prices**  
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23 Plaintiffs allege that Defendant RMCF sold products to discount retailers at lower prices,  
24 and did not disclose that it would do so. (FAC ¶¶ 19 and 65(b)-(c).) But Defendant RMCF  
25 disclosed that it reserved the right to sell its products “at any location other than at the  
26 Franchised Location, including . . . unrelated retail outlets.” (Franchise Agreement § 3.3.) (*See*  
27 *also* UFOC § 12 and Closing Acknowledgement § 8.) And, Defendant RMCF stated that it  
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1 reserved the right to sell the products on “any terms and conditions as the Franchisor deems  
2 advisable, and without granting the Franchisee any rights therein.” (Franchise Agreement §  
3 3.3(3).) Thus, Plaintiffs have failed to state a claim for a breach of contract.

4 Plaintiffs have also failed to state a claim for breach of the implied covenant of good faith  
5 and fair dealing, because the right to sell to other retailers was a right expressly stated in the  
6 contract. The implied covenant of good faith and fair dealing cannot invalidate rights expressly  
7 granted in a contract. *See also Rocky Mountain Chocolate Factory, Inc. v. SDMS, Inc.*, 2007  
8 WL 4268962, \*4 (D.Colo.) (finding summary judgment appropriate because UFOC disclosed  
9 that RMCF would sell its products to third-party retailers.)

### 10 11 **1.3 Offers of Different Products to Discount Retailers**

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13 Plaintiffs allege that Defendant RMCF breached the contract because it offered to third-  
14 party retailers products that were not available to Plaintiffs. (FAC ¶ 65(d).) But Defendant  
15 RMCF disclosed that it would sell “products and services similar to those which the franchisee  
16 will sell.” (*See* Franchise Agreements § 3.3(3).) Thus, Plaintiffs have failed to state a claim that  
17 Defendant RMCF breached the contract or the covenant of good faith and fair dealing.

### 18 19 **1.4 Failure to Use Marketing Fees to Promote the Franchisees**

20  
21 Plaintiffs allege that Defendant breached the contract and the implied covenant of good  
22 faith and fair dealing by failing to use marketing fees collected from the franchisees to promote  
23 the franchisees. The Franchise Agreement explicitly states that “[t]he Marketing and Promotion  
24 Fees will be administered by the Franchisor, in its sole discretion, and may be used for . . .  
25 expenditures relating to advertising the Franchisee’s products and services.” (Franchise  
26 Agreement § 12.3(d).) As the Franchise Agreement states, Defendant RMCF had the ability to  
27 use the marketing fees in its sole discretion. Thus, Plaintiffs have failed to state a claim that  
28

1 Defendant RMCF was required under the contract to utilize the marketing fees to promote only  
2 the franchise system.

3 Plaintiffs have successfully stated a claim that Defendant RMCF breached the implied  
4 covenant of good faith and fair dealing. While the marketing fee expenditures were in  
5 Defendant RMCF's discretion, it may well have been Plaintiffs' justified expectation that  
6 Defendant RMCF would apply at least some of their Marketing Fees in a way that would benefit  
7 them.

### 8 9 **1.5 Statement that Change in Royalty Structure Would Benefit** 10 **Franchisees**

11  
12 This statement did not breach any term of the contract and did not breach the implied  
13 covenant of good faith and fair dealing.

### 14 15 **1.6 Conclusion**

16  
17 The Court DENIES Defendant RMCF's Motion to Dismiss Plaintiffs' First Claim for  
18 Relief only to the extent that Plaintiff has adequately stated a claim that Defendant RMCF's  
19 expenditure of the marketing fees breached the implied covenant of good faith and fair dealing.  
20 Otherwise, the Motion to Dismiss Plaintiffs' First Claim for Relief is GRANTED with leave to  
21 amend.

## 22 23 **2. PLAINTIFFS' SECOND CLAIM FOR RELIEF FOR FRAUD**

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25 Plaintiffs allege that Defendant RMCF committed fraud: (1) because Defendant RMCF  
26 approved the Westminster location, thus implying that the Westminster location would be  
27 financially successful (FAC ¶ 69); (2) because Defendant RMCF's UFOC states that Defendant  
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1 RMCF does not have access to the sales information of its franchisees; and (3) because  
2 Defendant RMCF's salesperson stated that a franchise would be suitable for Plaintiffs (FAC  
3 ¶¶ 33, 71.) Defendant RMCF argues that none of these actions amount to fraud.

## 4 5 **2.1 Approval of the Westminster Location**

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7 Plaintiffs allege that because Defendant RMCF approved the Westminster Mall location,  
8 they represented that the business would be economically viable. (FAC ¶ 69.) But the Franchise  
9 Agreement specifically states that "approval of a lease for the Franchised Location by the  
10 Franchisor does not constitute a recommendation, endorsement or guarantee by the Franchisor of  
11 the suitability of the location or the lease and the Franchisee should take all steps necessary to  
12 ascertain whether such location and lease are acceptable." (Franchise Agreement § 5.1.) Thus,  
13 because Defendant RMCF states in its Franchise Agreement that its approval of a franchise  
14 location does not guarantee the success of the franchise, the Court finds that Plaintiff has failed  
15 to state a claim against Defendant RMCF for fraud. The Court GRANTS Defendant's Motion as  
16 applied to this claim.

## 17 18 **2.2 Statement that Defendant RMCF Lacked Access to Operating Costs of** 19 **its Franchisees**

20  
21 Plaintiffs allege that the UFOC makes a misrepresentation when it states that Defendant  
22 RMCF did "not have access to nor knowledge of the expenses or costs incurred by each of the  
23 169 franchised Stores." (UFOC § 19 n. 5.) Plaintiffs argue that Defendant RMCF does have  
24 access to that information, because its franchise agreement requires its franchisees to submit  
25 quarterly financial statements. (FAC ¶ 70.)

26 Defendant RMCF claims that Plaintiffs have not shown that Defendant RMCF actually  
27 requested or obtained or otherwise had the relevant sales data. Defendant RMCF also argues  
28

1 that the fact that Defendant RMCF had the right to obtain financial statements does not  
2 necessarily mean that Defendant RMCF had “access to” the information. (Motion 9:16-27.)  
3 The Court disagrees. Plaintiffs have adequately pled this claim for fraud. *See also SDMS, Inc.*,  
4 2007 WL 4268962, \*3 (D. Colo. 2007) (finding that the alleged misrepresentations in the UFOC  
5 amounted to a genuine issue of material fact and that franchisees may have relied on the  
6 misrepresentation). The Court DENIES Defendant RMCF’s Motion as to this claim.

### 7 8 **2.3 Statement that this Franchise Would be Suitable for Plaintiffs**

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10 Plaintiffs allege that Defendant’s salesperson, Kraig Carlson, (“Carlson”), stated that the  
11 franchise would be a suitable business for them. Defendant RMCF asserts that it is not liable for  
12 any statements made by Carlson. Both the Franchise Agreement and UFOC state that Defendant  
13 RMCF would not be liable for any oral representations made. By signing those documents,  
14 Plaintiffs acknowledged and agreed that no representation had been made to them regarding the  
15 potential success of their business. (See Franchise Agreement §§ 22.4, 22.15, UFOC Item 19,  
16 and Closing Acknowledgement § 8.)

17  
18 Plaintiffs’ UFOC states, in bold, that:

19  
20 Except for the information in this item, no representations or statements  
21 of actual, average, projected, forecasted or potential sales, costs, income  
22 or profits are made to franchisees by us. We do not furnish or make, or  
23 authorize our sales personnel to furnish or make, any oral or written  
24 information concerning the actual, average, projected, forecasted or  
25 potential sales, costs, income or profits of a franchise or prospects or  
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1 chances of success that any franchisee can expect or that present or past  
2 franchisees have had, other than as set forth in this item. We disclaim  
3 and will not be bound by any unauthorized representations.

4 (UFOC § 19 (7).) Additionally, the Franchise Agreement states that Defendant RMCF “shall not  
5 be liable or obligated for any oral representations or commitments made prior to the execution  
6 hereof or for claims of negligent or fraudulent misrepresentation based on any such oral  
7 representations or commitments.” (Franchise Agreement § 22.4.) The Franchise Agreement  
8 also states that “[t]he Franchisee further acknowledges and agrees that no representations have  
9 been made to it by the Franchisor regarding projected sales volumes, market potential, revenues,  
10 profits of the Franchisee's Rocky Mountain Chocolate Factory Store, or operational assistance  
11 other than as stated in this Agreement or in any disclosure document provided by the Franchisor  
12 or its representatives.” (*Id.*) Plaintiffs further agreed that they were “solely responsible for the  
13 successful operation of [their Rocky Mountain] Store,” acknowledged that the success of their  
14 business involved substantial risks and depended upon their ability as independent business  
15 persons, and agreed that Rocky Mountain had not made assurances or warranties as to the  
16 potential success or earnings of their store. (*Id.* at § 22.15.) *See also Kieland v. Rocky Mountain*  
17 *Chocolate Factory*, 2006 WL 2990336, \*4 (D. Minn. 2006) (finding that Defendant RMCF’s  
18 UFOC clearly stated that its sales personnel were not authorized to make any oral projections  
19 regarding a franchisee’s potential success).

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25 Based on these contractual provisions, the Court GRANTS Defendant RMCF’s Motion as  
26 to this claim.  
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## 2.4 Conclusion

The Court DENIES Defendant RMCF's Motion to Dismiss Plaintiffs' Second Claim for Relief only to the extent that Plaintiff has adequately stated a claim that Defendant RMCF's UFOC falsely stated that Defendant RMCF did not have "access to" cost information about its franchisees. Otherwise, the Motion to Dismiss Plaintiffs' First Claim for Relief is GRANTED with leave to amend.

## 3. PLAINTIFFS' THIRD CLAIM FOR RELIEF FOR A FAILURE OF CONSIDERATION

Plaintiffs allege that because Defendant RMCF sold its product to Costco and Target, that the value of the mark, "Rocky Mountain Chocolate Factory," has been diminished, and thus there was failure of consideration for this contract. (FAC ¶ 76.) A failure of consideration results when there is a failure in a material aspect of the contract. *See Restatement (Second) of Contracts* § 237 (1981). The Court finds that Plaintiffs have failed to adequately claim a failure in a material aspect of the contract.

By entering a franchise agreement with Defendant RMCF, Plaintiffs received "the right to use the Marks and Licensed Methods in connection with the establishment and operation" of a store and to use the "the Marks and Licensed Methods, as they may be changed, improved, and further developed by the Franchisor." (Franchise Agreement § 2.1.) Plaintiffs have not alleged that they were deprived of any of those rights. They only allege that the value of those rights has diminished as a result of Defendant RMCF's treatment of the marks. This is not a failure of a material aspect of the contract, especially since Defendant RMCF explicitly reserved the right to change, improve, and further develop the marks and licensed methods. Thus, Defendant's Motion is GRANTED with leave to amend as to Plaintiffs' Third Claim for Relief.

**4. PLAINTIFFS' FOURTH CLAIM FOR RELIEF FOR NEGLIGENCE**

According to the Opposition to the Motion to Dismiss ("Opposition"), Plaintiffs have withdrawn this claim.

**5. PLAINTIFFS' FIFTH CLAIM FOR RELIEF FOR UNCONSCIONABLE CONTRACT**

According to the Opposition, Plaintiffs have withdrawn this claim.

**6. PLAINTIFFS' SIXTH CLAIM FOR RELIEF FOR VIOLATIONS OF THE CALIFORNIA FRANCHISE INVESTMENT LAW**

The California Franchise Investment Law ("CFIL") governs how franchises are established. The CFIL's provisions were designed to protect franchise investors from unfair contracts and business practices. *See Thueson v. U-Haul Intern., Inc.*, 144 Cal.App.4th 664, 675 (2006). Plaintiffs allege that Defendant RMCF violated the CFIL by: (1) not providing cost and expense information (FAC ¶¶ 90, 91); and (2) misrepresenting that a franchise would be a perfect business for them. (FAC ¶¶ 33, 90.) The Court will discuss both allegations.

**6.1 Failure to Provide Cost and Expense Information**

Plaintiffs allege that Defendant RMCF and Defendant Merryman violated Cal. Corp. Code § 31202, which states that "[i]t is unlawful for any person willfully to make any untrue statement of a material fact in any statement required to be disclosed in writing pursuant to § 31101, or willfully to omit to state in any such statement any material fact which is required to be stated therein." Plaintiffs assert that Defendant RMCF violated this provision by not

adequately disclosing franchise cost and expense information in the UFOC.

But California law states that a UFOC need not disclose cost and expense information, as long as the UFOC makes clear that cost and expense information is not being disclosed. Cal. Admin. Code tit. 10 § 310.114.1(c)(6). Defendant's UFOC's disclosure states in capital letters, "Caution: While the attached figures represent actual gross sales of franchised stores during out most recent fiscal year ended February 28, 2005, the following data should not be considered as the actual, potential or probable gross sales that will be realized by you or any other franchisees." UFOC § 19. Thus, Defendant RMCF did not violate the CFIL as its UFOC clearly stated that it was only providing the gross sales information.

In their opposition, Plaintiffs also argue that their CFIL claim is based on the false statement in the UFOC that Defendant RMCF did not have access to the cost data. But Plaintiffs do not show that this untrue statement occurred "in [a] statement required to be disclosed in writing pursuant to Cal. Corp. Code § 31101." Cal. Corp. Code § 31202. Thus, this allegation does not show a violation of the CFIL.

## **6.2 Statement that a Franchise Would be Suitable for Plaintiffs**

Plaintiffs also contend that Carlson's alleged statement that a franchise would be suitable for Plaintiffs violates the CFIL. (FAC ¶ 90.) But as explained, Defendant RMCF is not liable for any statements made by its representatives.

## **6.3 Conclusion**

The Court finds that Plaintiffs have not stated a claim against Defendant RMCF under the CFIL. As a result, the Court also finds that Plaintiffs have not stated a claim against Defendant RMCF's Chief Operating Officer, Defendant Merryman.

1 Thus, the Court GRANTS the Motion with leave to amend as to Plaintiffs' Sixth Claim  
2 for Relief.

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4 **7. PLAINTIFFS' SEVENTH CLAIM FOR RELIEF FOR VIOLATIONS OF**  
5 **CALIFORNIA BUSINESS & PROFESSIONS CODE § 17000**  
6

7 Plaintiffs allege that Defendant RMCF violated Cal. Bus. & Prof. Code § 17000, *et seq.* because:  
8 (1) Defendant RMCF made misrepresentations regarding access to the costs of the franchisees;  
9 (2) Carlson falsely stated that a franchise was suitable for Plaintiffs; and (3) Defendant RMCF  
10 offered discounted and different products to other retailers. FAC ¶ 97 (a-e). The purpose of Cal.  
11 Bus. & Prof. Code § 17000, *et seq.* is to "safeguard the public" from "practices by which fair and  
12 honest competition is destroyed or prevented." § 17001. The Court finds that Plaintiffs have not  
13 alleged any acts that are prohibited under Cal. Bus. & Prof. Code § 17000, *et seq.*  
14

15 **7.1 Misrepresentation About Access to Cost Information.**  
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17 Although the Court does find that Plaintiffs have sufficiently alleged that the UFOC  
18 contained a misrepresentation about Defendant RMCF's access to the cost and expense  
19 information of its franchisees, this claim is not actionable under Cal. Bus. & Prof. Code § 17000,  
20 *et seq.* See Cal. Bus. & Prof. Code §§ 17040-17051. Thus, the Court dismisses this allegation  
21 against Defendant RMCF.  
22

23 **7.2 Carlson's Statement that a Franchise was Suitable for Plaintiffs**  
24

25 As stated in Section 2(c) above, Defendant RMCF is not liable for Carlson's statements.  
26 Thus, the Court dismisses this allegation against Defendant RMCF.  
27  
28

### 7.3 Sales of Products to Discount Retailers

Plaintiffs argue that Defendant RCMF violated Cal. Bus. & Prof. Code § 17000, *et seq.* by selling different products at a cheaper price to third-party retailers. This appears to be a claim under Cal. Bus. & Prof. Code § 17045 (“§ 17045”). Section 17045 states “that the secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchases purchasing upon like terms and conditions” is unlawful when a competitor is injured and where the payments destroy competition.

To state a claim under § 17045, Plaintiffs must allege that purchasers were purchasing on “like terms and conditions.” *Eddins v. Redstone*, 134 Cal.App. 4th 290, 332-33 (2006). Yet, Plaintiffs’ factual allegations appear to establish that the third-party retailers were purchasing on different terms and conditions. (FAC ¶¶ 97(d)-(e).) *See also Windsor Auctions, Inc. v. eBay, Inc.*, 2008 WL 2622791, \*5 (N.D.Cal. 2008). Accordingly, § 17045 does not provide Plaintiffs with relief.

Additionally, under § 17042, Defendant is permitted to sell differently priced products to different customers. Section 17042(c) states that “a differential in price for any article of product as between any customers in different functional classifications” is not prohibited. “Wholesaler” and “retailer” are different functional classifications. § 17042(b). Thus, because the third-party retailers like Costco are considered wholesalers, and the franchisees are considered retailers, Defendant RCMF has not violated § 17042.

### 7.4 Conclusion

The Court finds that Plaintiffs have failed to state a claim under the Cal. Bus. & Prof. Code § 17000, *et seq.* Thus, the Court GRANTS with leave to amend Defendant RCMF’s Motion as to the Plaintiffs’ Seventh Claim for Relief.

**8. PLAINTIFFS' EIGHTH CLAIM FOR RELIEF FOR VIOLATIONS OF  
§ 17200 OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE**

Plaintiffs' eighth claim for relief alleges that Defendant RMCF violated Cal. Bus. and Prof. Code § 17200 *et seq.* ("§ 17200"). Section 17200 states that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited" under Cal. Bus. & Prof. Code § 17500. Plaintiffs allege that Defendant RMCF committed sixteen different unfair and unlawful acts, including the oral and written misrepresentations made regarding Defendant RMCF's access to cost and expense information. Because the Court has already found that Plaintiffs have sufficiently alleged that Defendant RMCF committed fraud when it stated that it did not have access to cost and expense information, the Court finds that Plaintiffs have sufficiently pled a claim under § 17200. Defendant RMCF's Motion to Dismiss the Plaintiffs' Eight Claim for Relief is DENIED.

**9. PLAINTIFFS' ELEVENTH CLAIM FOR RELIEF FOR FRAUD**

According to the Opposition, Plaintiffs have withdrawn this claim as alleged against Defendant Merryman.

Plaintiffs allege that Carlson made misrepresentations to them concerning the franchise's potential sales. Plaintiffs allege that Plaintiffs' realtor emailed to them and to Carlson a list of sales information about the other food stores in the Westminster Mall. Plaintiffs asked Carlson about the figures in the email. In response, Carlson stated that, in his experience, a franchise would have 40% of the gross sales of a See's Candies store. (FAC ¶¶ 41, 133, 134.) Plaintiffs contend that that statement constitutes fraud.

Again, Plaintiffs' UFOC and Franchise Agreement clearly state that Defendant RMCF does not authorize its sales personnel to make any projections about a franchise's potential

1 success. Thus, the Court GRANTS with leave to amend Defendant RMCF's Motion as to  
2 Plaintiffs' Eleventh Claim for Relief.

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4 **10. PLAINTIFFS' TWELFTH CLAIM FOR RELIEF FOR CONSPIRACY TO**  
5 **COMMIT FRAUD**

6  
7 According to the Opposition, Plaintiffs have withdrawn this claim as alleged against  
8 Defendant Merryman.

9 The Court has dismissed Plaintiffs' Eleventh Claim for Relief for Fraud. Accordingly,  
10 the Plaintiffs' Twelfth Claim for Relief for Conspiracy to Commit Fraud also fails. The Court  
11 GRANTS Defendant RMCF's Motion to Dismiss the Twelfth Cause of Action, with leave to  
12 amend.

1 **DISPOSITION**

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3 Defendant RMCFs' Motion is GRANTED with leave to amend as to Plaintiffs' Third,

4 Sixth, Seventh, Eleventh, and Twelfth claims as alleged against them. Defendant RMCF's

5 Motion is GRANTED with leave to amend as to Plaintiffs' Sixth Claim for Relief as alleged

6 against Defendant Merryman. Defendant RMCF's Motion is DENIED as to Plaintiffs' First,

7 Second, and Eighth Claims for Relief. If Plaintiffs desire to do so, they shall file a second

8 amended complaint within 21 days hereof setting forth adequate allegations against Defendants

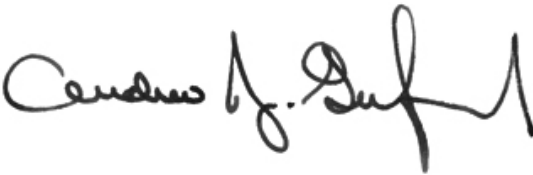
9 RMCF and Merryman regarding the amendable claims. The second amended complaint shall be

10 complete in and of itself, and shall not incorporate by reference any prior pleading.

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12 IT IS SO ORDERED.

13 DATED: July 21, 2008

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16 Andrew J. Guilford

17 United States District Judge

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